LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 12 1965
JOHN F. DAVIS, CLERK

In the
# Supreme Court of the United States

OCTOBER TERM, 1964

No. 904

CUMBERLAND FARMS NORTHERN, INC.,
APPELLANT

*v.*

MAINE MILK COMMISSION,
APPELLEE

## ON APPEAL FROM THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

## JURISDICTIONAL STATEMENT

SIDNEY W. WERNICK,
*Counsel for Appellant*
85 Exchange Street
Portland, Maine

*Of Counsel*
BERMAN, BERMAN, WERNICK & FLAHERTY
85 Exchange Street
Portland, Maine

Blanchard Press, Inc., Boston, Mass. — Law Printers

# INDEX

## Subject Index


| | Page |
|---|---|
| Jurisdictional Statement | 1 |
| Opinion Below | 2 |
| Jurisdiction | 2 |
| Question Presented | 3 |
| Statutes Involved | 4 |
| Statement of the Case | 4 |
| The Questions Are Substantial | 9 |
| Conclusion | 22 |
| Appendix A | |
| Opinion of Supreme Judicial Court Sitting as Law Court | 1a |
| Mandate of Supreme Judicial Court | 19a |
| Judgment of Permanent Injunction | 20a |
| Docket Entries [in Supreme Judicial Court] | 21a |
| Appendix B | |
| Pertinent Provisions of Ch. 33, R.S. of Me., 1954, as amended—the Maine Milk Control Law | 22a |


## Table of Cases Cited


*Board of Supervisors of Elizabeth County* v. *State Milk Commission*, 191 Va. 1, 60 S.E. 2d 35 (1950) 13

*Borden Co.* v. *Ten Eyck*, 297 U.S. 251 (1936) 18, 19, 20

*Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1935) 16

*Dahnke-Walker Milling Company* v. *Bondurant*, 257 U.S. 282 (1921) 3

*Gwinette* v. *Myers*, 237 S.C. 17, 115 S.E.2d, 673 (1960) 14

*Harris* v. *Duncan*, 208 Ga. 561, 67 S.E. 2d 692 (1951) 14

*Highland Farms* v. *Agnew*, 300 U.S. 608 (1936) 17, 20

Page

*Mayflower* v. *Ten Eyck*, 297 U.S. 266; (dissenting opinion, pp. 276, 277) (1935) 19, 20

*Mayo* v. *Lakeland Highlands Can Company*, 309 U.S. 310 (1939) 15

*Milk Control Board* v. *Eisenberg*, 306 U.S. 346 (1939) 20

*Nebbia* v. *People of New York*, 291 U.S. 502 (1934) 9, 15

*Ray, et al* v. *Parker*, 15 Cal. 2d 275, 101 P(2d) 665 (1940) 14

*Stone* v. *Salley*,—S.C.—, 137 S.E. 2d 788 (1964) 14

STATUTES CITED

Maine Milk Commission Law, R.S. of Me. 1954 Ch. 33 as amended 2, 3, 4, 5, 6, 10

7 MRSA Secs 2951-2960, incl. 4, 10

New York Session Laws 1934, Ch. 126 20

P.L. of Me. 1961, Ch. 410 12

R.S. of Me. 1954, Ch. 103 Secs. 9 & 15, as amended 1

R.S. of Me. 1954, Ch. 106, Sec. 5, as amended 1, 2

38 U.S.C. Sec. 1257 (2) 3

# In the
# Supreme Court of the United States

OCTOBER TERM, 1964

No.

CUMBERLAND FARMS NORTHERN, INC.,
APPELLANT

*v.*

MAINE MILK COMMISSION,
APPELLEE

**ON APPEAL FROM THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE**

## JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Judicial Court of Maine, sitting as a Law Court, (Ch. 103, Secs. 9 & 15, R.S. of Me., 1954, as amended), entered on the 4th day of December, 1964.

The judgment denied the appeal of appellant from a judgment of permanent injunction which had been issued by a single justice of said Supreme Judicial Court who sat, at nisi prius, in the Superior Court within and for the County of Kennebec, State of Maine (pursuant to Ch. 106, Sec. 5, R. S. of Me., 1954, as amended). The injunction

permanently enjoined appellant from issuing and delivering certain coupons which had been given by appellant on each retail sale of its milk and redeemable in cash in the event that consumer price-fixing by the Maine Milk Commission, pursuant to Ch. 33, R.S. of Me., 1954, as amended, be declared unconstitutional.

Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

## Opinion Below

The opinion of the Supreme Judicial Court of the State of Maine, sitting as a Law Court, is presently reported in 205 Atl. 2d 146 (1964). The opinion of the single justice is not reported. The opinion of the Supreme Judicial Court, sitting as a Law Court, its judgment, the judgment of permanent injunction entered by the single justice and all of the docket entries in the Supreme Judicial Court are appended hereto, identified as "Appendix A".

## Jurisdiction

Appellee had instituted, as plaintiff, a civil action in the Superior Court within and for the County of Kennebec, State of Maine, against appellant, as the defendant in said action. The action sounded in equity and was, therefore, brought on for hearing before a single justice of the Supreme Judicial Court of the State of Maine, sitting in the Superior Court (pursuant to Ch. 106, Sec. 5, R.S. of Me., 1954, as amended). The decision of the single justice ordered a permanent injunction to issue against appellant, enjoining it from delivering certain coupons in conjunction with retail sales of milk in the State of Maine. An appeal was taken by appellant to the Supreme Judicial Court

of the State of Maine, sitting as a Law Court. The judgment of said court was entered on December 4, 1964, denying the appeal of appellant. Notice of appeal to the Supreme Court of the United States was filed in said Supreme Judicial Court of Maine on the 18th day of December, 1964.

The jurisdiction of the Supreme Court of the United States to review this decision of the Supreme Judicial Court of Maine by direct appeal is conferred by Title 28, U.S.C., Sec. 1257 (2), in that there is drawn in question the validity of a statute of the State of Maine (to wit, Ch. 33, R.S. of Me., 1954, as amended), on grounds of its being repugnant to the "due process" and "equal protection of the laws" clauses of the Fourteenth Amendment to the Constitution of the United States; and the decision of the Supreme Judicial Court of Maine, sitting as a Law Court, is in favor of the validity of the statute. The following decision sustains the jurisdiction of the Supreme Court of the United States to review the judgment on direct appeal in this case:

*Dahnke-Walker Milling Company* v. *Bondurant*, 257 U.S. 282 (1921).

## Question Presented

1. Is it an unreasonable exercise and, therefore, an abuse of its police power, and a violation of the "due process" clause and the "equal protection of the laws" clause of the Fourteenth Amendment to the Constitution of the United States for the State of Maine to legislate, by a statute designed to be permanent (Ch. 33, R.S. of Me., 1954, as amended), that government, mandatorily, must, at all times, fix minimum prices for retail sales of milk, effective continuously and without any cessation whatever,—thereby establishing as the law of Maine that a private businessman shall never have the right, or liberty, to sell his milk at

retail in the State of Maine at such price as he, in his own business judgment, may deem appropriate?

## Statutes Involved

This case involves Ch. 33 of R.S. of Me., 1954, as amended, with special emphasis upon Sec. 4 thereof, to be found in Volume I of said Revised Statutes (commencing at page 835 thereof) and Volume I of the 1963 Cumulative Supplement to said Revised Statutes (commencing at page 638 thereof). It may now be found also in Volume 2 of M.R.S.A., cited as 7 M.R.S.A., Secs 2951-2960, incl. The statute involved being lengthy, the pertinent provisions thereof are set forth in an appendix hereto, designated "Appendix B".

## Statement of the Case

Appellant, a corporation organized and existing by law, at all times relevant herein was, and is, engaged in the business of distributing, selling or offering to sell milk at retail in the State of Maine, and had procured all licenses required by the laws of the State of Maine for the conduct of said business.

On August 31, 1963, as an incident of its selling milk at retail in Maine, appellant issued to persons making purchases of milk at a retail store of appellant in the City of Portland, Maine, coupons which offered a cash redemption opportunity for a half gallon of milk in the amount of ten cents and for a gallon of milk in the amount of twelve cents "when the Maine consumer milk price-fix is adjudicated unconstitutional". To effect a purchase, a purchaser of a gallon of milk paid to appellant, in actual money, the amount of ninety-one cents plus twenty-five cents jug deposit, the deposit being required by the Maine Milk Commis-

sion. A purchaser who purchased a half-gallon of milk paid to appellant, in actual money, fifty cents plus the required jug deposit of fifteen cents. The ninety-one cent price for the gallon and the fifty cent price for the half-gallon were in accordance with minimum prices which had been fixed by the Maine Milk Commission, effective August 1, 1963.

By a complaint instituted in the Superior Court within and for the County of Kennebec, State of Maine, the Maine Milk Commission complained of the actions of appellant. The Commission asserted that the delivery of the coupons to purchasers was a device allowing for ultimate refunds by which minimum prices for August 31, 1963, operative in the City of Portland—minimum prices which the Maine Milk Commission claimed had been validly established by it—were being reduced. Hence, the Commission maintained that the conduct of appellant involved practices prohibited under the provisions of Sec. 4 of Ch. 33 of R.S. of Me., 1954, as amended, as being destructive of the schedule of minimum prices of milk at retail established by the Maine Milk Commission in the Portland market, and should be enjoined, pursuant to the provisions of Sec. 9-A of said Ch. 33.

In its answer to the complaint appellant had raised the issue under the United States Constitution here involved, as follows:

> "The minimum prices of the sale of milk at retail throughout the market areas of the state alleged to have been established and fixed by the Maine Milk Commission, and which it is alleged that the practices of the defendant, as described in the complaint, are destroying, are unconstitutional and, therefore, null and void such that statutory provisions regarding protection of such minimum prices against rebates, gratuities, or discounts, or other practices destructive

of such scheduled minimum prices, are likewise unconstitutional and null and void. The reasons for said unconstitutionality are as follows:

1. The Maine Milk Commission established and fixed the minimum prices relied upon by the plaintiff in this proceeding pursuant to findings made by it that the Maine Milk Commission lacks statutory authority under Chapter 33, R.S. of Maine, 1954, as amended, to order the complete elimination of retail price fixing for any trial period. Thereby the Maine Milk Commission has construed said statute to require, and compel, at all times, a governmentally fixed minimum price for retail sales of milk. So construed, Chapter 33, R.S. of Me., 1954, as amended, and the orders of the Maine Milk Commission fixing such minimum prices on the basis of such a construction of the statute are unconstitutional. So construed, the statute, and the orders issued pursuant to the statute violate . . . the Fourteenth Amendment to the Constitution of the United States, in that government compulsion requiring that there be, at all times, minimum prices for retail sales of milk, as fixed by a governmental commission, and that there may not be any periods during which the retail sales price of milk may be determined by private business without governmental interference or regulation by retail sale minimum price fixing, is arbitrary, unreasonable, and discriminatory, and cannot be deemed a proper exercise of the police power of the state".

(Transcript of Record pp. 83, 84)

The single justice in his opinion avoided the constitutional issue. He said:

"The question of constitutionality of the law is not before the court, as a single justice, at this time."

(Transcript of Record, p. 76)

The opinion of the Supreme Judicial Court, sitting as a Law Court, explicitly states:

"In the hearing below the single justice did not pass upon the constitutionality of the Maine Milk Commission Law. He felt obliged to presume that the law was constitutional in accordance with the well-established principle that the trial court was bound by the presumption of constitutionality."

(Transcript of Record, p. 121) (Appendix A, p. 1a)

Having thus presumed the statute in controversy to be constitutional, the single justice, in making his decision as to statutory interpretation, concluded that the coupon plan of appellant was destructive of the scheduled minimum prices established by the commission and, therefore, a violation of Sec. 4 of Ch. 33, R.S. of Me., 1954, as amended, to enjoin which, without regard to irreparable injury, an injunction should issue by virtue of Sec. 9-A of said statute, as amended. The single justice first issued a temporary injunction against appellant and subsequently, on the same basis that underlay the temporary injunction, a judgment of permanent injunction was entered under date of February 11, 1964. This injunction "permanently enjoined [appellant] from the issuance and delivery of coupons here subject to complaint in connection with sales of milk in the State of Maine."

(Transcript of Record, p. 86) (Appendix A, p. 20a)

Appellant filed notice of appeal from the aforesaid permanent injunction, as well as from the findings of the single justice which were incorporated in such judgment, the

appeal being to the Supreme Judicial Court of Maine, sitting as a Law Court. In its statement of points filed pursuant to Rule 74(d) of the Maine Rules of Civil Procedure, appellant renewed its contention that Ch. 33, R.S. of Me., 1954, as amended, "is unconstitutional and, therefore null and void . . ." As the reason for unconstitutionality, appellant specified:

> "A. It is in violation of . . . the Fourteenth Amendment to the Constitution of the United States because as construed by the Maine Milk Commission and the court below, it compels government at all times to fix minimum prices for the retail sales of milk and precludes any periods during which the retail sales price of milk may be determined by private business without governmental interference or regulation, such that the statute is arbitrary, unreasonable and discriminatory and cannot be deemed a proper exercise of the police power of the state."
>
> (Transcript of Record, pp. 88, 89)

The foregoing issue of constitutionality under the United States Constitution was raised by brief and oral argument before the Supreme Judicial Court of the State of Maine, sitting as a Law Court. Said court rendered its decision and judgment on December 4, 1964, and denied the appeal taken by appellant from the judgment of permanent injunction which had been issued by the single justice. In its opinion, the Supreme Judicial Court, sitting as a Law Court, stated categorically that the constitutional issue under the Fourteenth Amendment to the Constiution of the United States was directly involved in the case and was a necessary part of the court's decision; and the court undertook explicitly to decide the said constitutional issue. The court said:

> "The constitutional issue is the dominant issue in the case before this court. Cumberland challenges the constitutionality of the Maine Milk Commission Law as a violation of the provisions of the due process clauses of both the State and Federal Constitutions. . ."
> (Transcript of Record, p. 121) (Appendix A, p. 1a)

Subsequently, the court in positive terms stated as its conclusion and decision regarding the aforesaid constitutional issue, the following:

> 1. "We therefore hold that the Maine Milk Commission Law does not violate . . . the due process clause of the Constitution of the United States."
> (Transcript of Record, p. 135) (Appendix A, p. 14a)

**The Questions Are Substantial**

This appeal presents the substantial issue of whether the State of Maine has violated the Fourteenth Amendment to the Constitution of the United States by enacting legislation, designed as permanent legislation, which requires mandatorily that a person engaged in the business of selling milk at retail in Maine shall *never*, regardless of the actual state of market conditions from time to time, have a right to charge such retail price for his milk as he, in the exercise of sound business judgment, might deem appropriate.

The appeal to this court has been taken because the Supreme Judicial Court of Maine, to which the same question had been addressed, has furnished an answer (upholding the constitutionality of the legislation) which appellant contends has misconceived and misapplied the scope, as well as the underlying rationale, of the decision of this court in

*Nebbia* v. *People of New York*, 291 U.S. 502 (1934).

Thereby, the Maine court has reached conclusions concerning the magnitude of the power of a state to fix minimum prices for retail sales of milk, consistently with the Fourteenth Amendment, which were not intended by this court and which are seriously in error. If permitted to persist, the errors might well be duplicated in other states of the nation.

## I.

The Supreme Judicial Court of Maine has avowed that, as originally enacted and as it presently appears, Ch. 33, R.S. of Me., 1954, as amended, [now Title 7 M.R.S.A., §§ 2951-2960, inclusive] is

> "designed to be permanent legislation subject to repeal or amendment." (Transcript of Record, p. 122) (Appendix A, p. 2a)

The Maine court, in addition, has expressly recognized that the legal effect of said statute is to establish in the state of Maine

> "a system by which, permanently and unceasingly, the retail prices of milk must be fixed by an agency of government and that there can never be any period of time, regardless of the state of the market conditions in the industry, when a private businessman is at liberty to sell his own milk at such price as he may see fit . . ."
>
> (Transcript of Record, pp. 131, 132) (Appendix A, p. 11a)

The court holds that so drastic and extreme regulation of the economics of the milk industry in Maine does not violate the Fourteenth Amendment to the Constitution of the United States because:

> 1. "The object sought to be attained by the milk commission law is to prevent the disruption of the sales

and distribution of milk through unfair, destructive and uneconomic practices." (Transcript of Record, p. 134) (Appendix A, p. 13a)

2. "The method of obtaining that objective was the establishment of prices in the state." (Transcript of Record, p. 134) (Appendix A, p. 14a)

3. "The means adopted by the legislature relate directly and appropriately to the object sought to be obtained." (Transcript of Record, p. 135) (Appendix A, p. 14a)

To the extent that the object sought by the Maine Milk control statute is prevention of "the disruption of the sale and distribution of milk through unfair, destructive and uneconomic practices", the means adopted by the legislature—of requiring, *mandatorily, a continuous and incessant* fixing of minimum prices—can, with reason, be deemed "directly and appropriately related to the object sought to be obtained" only if the unfair, destructive and uneconomic practices sought to be prevented are themselves *constant and continuous,* or at least continually recurring such that they constitute an *ever-present* danger to the welfare of the state. Yet, the findings of the Maine court, adduced to provide constitutional justification for the statute, depict no such extremity. The court says only:

> "It is a matter of common knowledge [query] that the milk industry is one of the important industries in this state; that it is a food absolutely essential to the health of practically every individual in this state; that it is the primary diet of babies, and their health would be jeopardized without it; that it is essential to the balanced diet of the adult members of society; that it is perishable, cannot be stored and is peculiarly susceptible to bacteria; that a sufficient surplus supply is necessary to meet emergencies and that if the supply

were to be cut off for a few days dire results would follow; that it is essential that it be delivered to consumers in the quickest possible time; that the safeguarding of its purity and the insuring of an adequate supply to consumers presents a problem greater than in any other food product."

(Transcript of Record, p. 133) (Appendix A, pp. 12a, 13a)

The legislative emergency preamble to the amendment of the Maine milk control law, by virtue of which the courts were granted power to issue injunctions (P.L. of Me., 1961, Ch. 410), which the Maine court recites in its opinion as an additional finding, offers no more than the fact that "unfair practices have been carried on" in the past and "may be carried on" in the future.

(Transcript of Record, pp. 122, 123) (Appendix A, p. 2a)

Thus, both the highest court of Maine and the Maine legislature have significantly avoided any statement that unfair and destructive trade practices are constant, or inherent, in the milk industry and, further, have avoided stating that such practices are to be anticipated in the future as a constant, continuing or ever-present menace to an adequate supply of wholesome milk in the state. Surely, if the unfair competition to be anticipated in the milk industry in Maine is not of such nature as to pose a constant, or continuing or ever-present menace to the supply of wholesome milk in Maine, it is arbitrary and unreasonable, because grossly excessive, to maintain and retain as permanent legislation a system imposing upon the milk industry in Maine mandatory, continuous and unceasing price control through governmental establishment of minimum prices for retail sales of milk.

Even if it might be true (as the Maine court quotes, with approval, the statement of the California court), that the

legislature has power "to protect an industry from a perilous condition which is permanent in character", (Transcript of Record, p. 132) (Appendix A, p. 12a) neither the legislature of Maine nor the highest court of Maine has declared, or shown, that destructive and unfair competition is a "perilous" condition of the milk industry which *is "permanent* in character" or which is so recurrent, (if not constant or continuous), that incessant, continuous and mandatory, price-fixing is a *reasonably appropriate* economic policy, or method of combatting the danger.

In an effort to bridge this gap and sustain governmental price-fixing, designed to be permanent, and which is continuous and unceasing, the Maine high court takes ultimate refuge in the reliance placed by the legislature upon the notion that the milk industry is "affected with a public interest". The court says:

> "The object sought to be attained by the Milk Commission law is to prevent the disruption of the sale and distribution of milk through unfair, destructive and uneconomic practices. There is a further declaration that the sale and distribution of milk is an industry affected with a public interest . . ."
>
> (Transcript of Record, p. 134) (Appendix A, pp. 13a, 14a)

The Maine court quotes the following language from a decision of the Virginia court, a decision which this court was never asked to review:

> *Board of Supervisors of Elizabeth County* v. *State Milk Commission*, 191 Va. 1, 60 S.E. 2d 35 (1950):
>
> "Mr. Justice Roberts, speaking for the court in *Nebbia* v. *People of the State of New York* . . . did not base his decision upon an emergency, but on the ground that the milk industry was an industry affected with a public interest, and therefore subject

to legislative control and regulation for the public good." (Transcript of Record, p. 132) (Appendix A, pp. 11a, 12a)

In addition, the Maine court summarizes a holding of the California court, another decision which this court had not been asked to review:

> "*In Ray, et al* v. *Parker,* [15 Cal. 2d 275, 101 P(2d) 665 (1940)] the court held that the milk industry bears a close relation to the public welfare and is sufficiently clothed with a public interest to warrant its regulation under the exercise of the police power, not only in emergencies but at all times."
>
> (Transcript of Record, p. 132) (Appendix A, p. 12a)

The Maine court thus stresses the concept of being "affected with a public interest" to distinguish the milk industry in Maine from other private businesses in general and other food industries in particular. The court concludes that since the milk industry in Maine has been declared by the legislature to be "affected with a public interest", such finding justifies a mandatory fixing of minimum prices in the milk industry "not only in emergencies but at all times", continuously and incessantly. In this critical respect, the Maine court has misconceived the doctrine and rationale of *Nebbia* and allows talismanic nomenclature ("affected with a public interest") to yield a substantive result never intended, or approved, by this court.[1]

---

[1] The extent to which various state courts have misunderstood the import of the *Nebbia* decision regarding the concept of "affected with a public interest" is cogently shown by statements in *Harris* v. *Duncan*, 208 Ga. 561, 67 S.E.2d 692 (1951); *Gwinette* v. *Myers*, 237 S.C. 17, 115 S.E.2d 673 (1960); and *Stone* v. *Salley*, ___ S.C. ___, 137 S.E.2d 788 (1964), as well as the comments made upon those cases by the Supreme Judicial Court of Maine. (Transcript of Record, p. 130). (Appendix A, p. 10a)

The one point, appellant contends, that *Nebbia* undertakes to make explicitly clear is that the label, "affected with a public interest", adds nothing of substantive benefit upon which a state can rely in effecting regulation under the police power. Such designation of the milk industry does not render it a "public utility" or in any other sense "public" rather than "private" enterprise. *Nebbia* emphasizes that the milk industry is, and must be regarded as, private business and that the words, "affected with a public interest", mean only that, like all private property, the milk business is subject to governmental regulation through such excerise of the police power of the state as may be proper under all the circumstances.

The decision, and fundamental doctrine, of Nebbia is embraced in the following propositions.

1. Negatively, *Nebbia* repudiates the claim that the Fourteenth Amendment to the Constitution of the United States forbids governmental price-fixing as a means of regulating private business through the exercise of the police power. As Justice Roberts says for this court in *Nebbia*, 291 U.S. 502, 532:

> "The thought seems . . . to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negatived many years ago.
>
> *Munn* v. *Illinois*, 94 U.S. 113, 24 L.ed. 77"

Such negative holding of *Nebbia* was later re-affirmed by Justice Roberts in his opinion speaking for the court, in

*Mayo* v. *Lakeland Highlands Can Company*, 309 U.S. 310 (1939):

> "'The mere fact that the act fixes prices is, in itself insufficient to invalidate it. *Nebbia* v. *People of New York*, 291 U.S. 502 (1934)." (p. 318)

Justice Frankfurter reiterated the point in his concurring opinion in the same case:

> "In *Nebbia* v. *New York* this court recognized price control as one of the means open to a state for the protection of its welfare . . ." (p. 319)

Finally, Justice Cardozo, in his dissent in

> *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1935),

corroborates the negative holding of *Nebbia* when he asserts:

> ". . . *Nebbia* v. *New York* . . . lays down the applicable principle. There a statute of New York prescribing a minimum price for milk was upheld against the objection that price-fixing was forbidden by the Fourteenth Amendment." (p. 330)

2. Affirmatively, *Nebbia* holds that the guiding principle by which police power regulation is to be tested for constitutional validity under the Fourteenth Amendment is that:

> ". . . upon *proper* occasion and by the *appropriate* measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells." (emphasis supplied) (p. 537)

The application of such police power principle to the particular New York statute which was before the court in

*Nebbia* was found to sustain the New York statute on the grounds that:

> "So far as the requirement of due process is concerned . . . a state is free to adopt whatever economic policy may *reasonably* be deemed to promote public welfare, and to enforce that policy by legislation *adapted* to its purpose. . . . If the laws . . . have a *reasonable* relation to a *proper* legislative purpose and are neither arbitrary nor discriminatory, the requirements of due process are satisfied . . ." (emphasis supplied) (p. 537)

In *Highland Farms* v. *Agnew*, 300 U.S. 608 (1937), Justice Cardozo, speaking for the court, summarizes the affirmative aspects of the *Nebbia* holding and doctrine in the following language specifically applicable to the milk industry:

> "The power of a state to fix a minimum price for milk in order to save producers and with them the consuming public from price cutting so destructive as to endanger the supply, was affirmed by this court in *Nebbia* . . ." (p. 611)

In the case at bar, therefore, the Maine statute, correctly tested for constitutional validity under the Fourteenth Amendment by the foregoing principles and doctrine of *Nebbia*, precipitates as the crucial issue:

> what complex of circumstances justifies the state of Maine in establishing a system regulating retail sales of milk in Maine by which, *permanently, continuously* and *unceasingly*,—(such that the "proper occasion" for government fixing of minimum prices of milk is deemed to be *always*)—minimum prices for retail sales

of milk in Maine *must* be fixed by government—(such that *incessant, mandatory* governmental price-fixing, without periodic evaluation of whether actual and prospective market conditions require price-fixing, is an "appropriate measure")?

In this connection, it is most important to note that, so far as research discloses, no statute involving price-fixing in the milk industry which has been sustained by this court against constitutional attack under the Fourteenth Amendment, or which this court has been asked to review for constitutional validity under the Fourteenth Amendment, has involved the extreme and drastic features of the Maine statute, viz. the features that: (1) the statute is enacted as *permanent* legislation (unless repealed or amended by new legislative action); and (2) the statute makes government fixing of minimum retail prices of milk *mandatory* and requires that such prices be fixed by government *at all times, without cessation*, and regardless of the state of actual market conditions from time to time.

The New York statute which this court upheld in the *Nebbia* case expired, by its own terms, automatically, at the end of one year. While it may be true that this fact was not explicitly relied upon in the court's opinion in *Nebbia*, its importance as a material fact in the court's thinking was shortly thereafter brought to light by Justice Roberts, who had written the *Nebbia* opinion for the majority of the court. In

*Borden Co.* v. *Ten Eyck*, 297 U.S. 251 (1936),

Justice Roberts said of the New York statute and of this court's decision in *Nebbia*:

1. "In enforcing its policy of price fixing—a *temporary expedient* to redress an injurious economic condition . . . the legislature believed . . ." (emphasis supplied) (p. 261);
2. "*In these circumstances* [the special complex which had been adduced in Nebbia as existing in 1933 in New York] it was competent to the lawmakers to attempt, *during the limited term of the legislative experiment*, to preserve . . ." (emphasis supplied) (p. 262).

Such language and reasoning is most significant since the argument offered by the appellees, and accepted by this court as convincing, to sustain the constitutionality of the statutory provision at issue—(a provision which permitted dealers not having well-advertised trade-names to sell bottled milk to stores in the metropolitan New York area at up to one cent per quart less than the minimum prices fixed for other dealers)—was predicated on the theory that "the statute was temporary in character, intended to relieve a temporary economic situation . . ."

*Borden Co* v. *Ten Eyck*, 297 U.S. 251, 257 (1935)

Similarly, on the same day that *Borden Co.* v. *Ten Eyck*, supra, was decided Justice Cardozo emphasized that critical factors in the decision of *Nebbia* were that:

1. "The statute upheld by this court in Nebbia . . . was an *experiment* . . ." (emphasis supplied)
2. ". . .The *ephemeral* character of the project . . . the system of regulation had been set up as a temporary one to *tide* producers over the *rigors of the great depression.*" (emphasis supplied)

*Mayflower* v. *Ten Eyck*, 297 U.S. 266; (dissenting opinion, pp. 276, 277) (1936)

This repeated emphasis on the special market conditions operating in 1933, in the throes of America's calamitous depression, and on the temporary, ephemeral and experimental aspects of the New York legislation upheld in Nebbia,—legislation to meet the unique market conditions operating in 1933,—represents an attitude which is poles removed from sustaining a system, designed as permanent, of mandatory, continuous and unceasing governmental fixing of minimum prices for retail sales of milk.[2]

The case at bar, therefore, poses a substantially new and important issue to be decided by this court regarding a radical form of price-fixing in the milk industry and its validity under the Fourteenth Amendment to the Constitution of the United States. The Maine statute, as *perma-*

---

[2] The New York milk control statute, enacted subsequent to the statute involved in *Nebbia* and which was the legislation which came to the attention of this court in *Borden's Farm* v. *Ten Eyck*, 297 U.S. 251 (1936) and *Mayflower Farms* v. *Ten Eyck*, 297 U.S. 266 (1936) was (like the one year statute in *Nebbia*) itself a statute expiring after one year, and it was predicated upon the legislature's declaration that the "emergency still exists and may reasonably be expected to continue until April first, nineteen hundred thirty-five". Laws of N.Y. 1934, Ch. 126, Article 21-A, 258-K. It did not prescribe government price-fixing, mandatorily, unceasingly and continuously. Sec. 258-M. It provided that there would be an administrative evaluation of actual market conditions from time to time to study whether price controls could, or should, reasonably be terminated without undue danger to the public welfare. Moreover, in those cases this court was not asked to pass upon the validity of the general price-fixing requirements of the statute.

The milk control statute of the State of Virginia which was held valid by this court in relation to the Fourteenth Amendment in *Highland Farms Dairy* v. *Agnew*, 300 U.S. 608 (1937) authorized, but did not mandatorily require, governmental price-fixing. Further, the statute was not designed as permanent legislation since, by its own provisions, it was terminable upon passage of a simple joint legislative resolution or by proclamation of the governor in the event the General Assembly be not in session.

The Pennsylvania statute evaluated by this court in *Milk Control Board* v. *Eisenberg*, 306 U.S. 346 (1939) was considered by this court only in relation to the Interstate Commerce Clause of the Federal Constitution.

*nent* legislation, and because the milk industry is declared to be "affected with a public interest", demands that the minimum retail prices of milk sold in Maine *must* be fixed by government *continuously* and *unceasingly* and, therefore, without regard to whether, in fact, the state of market conditions from time to time would, or could, allow private enterprise in the milk industry to fix its own prices for retail sales of milk without basic and reasonably immediate danger to the public welfare of the state. This court has never approved as valid under the Fourteenth Amendment so extreme and excessive a governmental control of the economics of the milk industry as is imposed by the Maine statute. The Maine legislature and the Maine high court, giving token lip-service to the Maine milk industry as private business, in real effect, by declaring the sale and distribution of milk to be "affected with a public interest", have eliminated, on a basis intended to be permanent, precisely that feature which is a "sine qua non" of private property—the owner's right to charge his own price for the sale of his own property, as his own sound business judgment might indicate. This court has held that the state has power, *at times—"upon proper occasion"*—to fix minimum prices in the milk industry without transforming the milk industry from *private* business into public business. This court, however, has never held that the milk industry, as private property, may constitutionally be subjected to price-fixing which is designed as permanent, and which is, mandatorily, continuous and unceasing.

The conclusion of the Maine court that such power was constitutionally exerted by the state of Maine in the statute under attack represents, appellant maintains, a misunderstanding and misapplication of the scope of this court's decision and doctrine in the *Nebbia* case. If the errors are permitted to persist, substantial interests of all persons engaged in the milk industry in Maine, and in every other

state of the union, are, or could be, seriously prejudiced. A specific precedent will have been tolerated which could encourage other states so inclined unreasonably to enlarge the scope of governmental price-fixing for retail sales of milk. It is thus of importance that the constitutional issues raised be decided at this time by the Supreme Court of the United States.

## Conclusion

The questions herein presented are substantial and of public importance.

Respectfully submitted,

(s) SIDNEY W. WERNICK
SIDNEY W. WERNICK,
*Counsel for Appellant*
85 Exchange Street
Portland, Maine

*Of Counsel*
BERMAN, BERMAN, WERNICK & FLAHERTY
85 Exchange Street
Portland, Maine

## Appendix A

(Opinion of Supreme Judicial Court sitting as a Law Court)
Date Opinion Filed
December 4, 1964

MAINE MILK COMMISSION

*v.*

CUMBERLAND FARMS NORTHERN, INC.

RESCRIPT
SIDDALL, J.

This is an appeal from a judgment of permanent injunction issued by a single justice enjoining Cumberland Farms Northern, Inc., hereafter called Cumberland, from issuing and delivering certain coupons given on the sale of Cumberland's milk and redeemable in cash in the event that price-fixing by the Maine Milk Commission, hereafter called the Commission, be declared unconstitutional. In the hearing below the single justice did not pass upon the constitutionality of the Maine Milk Commission Law. He felt obliged to presume that the law was constitutional in accordance with the well-established principle that the trial court was bounded by the presumption of constitutionality.

The constitutional issue is the dominant issue in the case before this court. Cumberland challenges the constitutionality of the Maine Milk Commission Law as a violation of the provisions of the due process clauses of both the State and Federal Constitutions, and of the interstate commerce clause of the Federal Constitution.

The first price-fixing milk control legislation in this state was passed in 1935. (P.L. 1935, Chap. 13).

The legislative declaration at the time of the enactment of Chap. 13, P.L. 1935, was as follows:

> "Whereas, the distribution and sale of milk and cream within this state is a business affecting the public health, welfare and general interest of all the people of the state, and

Whereas, unfair, destructive and uneconomic practices in the business of said distribution and sale of milk and cream have developed which threaten the disruption of said business and great loss to all persons engaged in said business and which create a situation which cannot be adequately controlled and remedied by existing statutes, and

Whereas, in the judgment of the legislature these facts create an emergency within the meaning of section 16 of Article XXXI of the constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety;"

This Act was designed to be permanent legislation, subject to repeal or amendment. With few exceptions the Act has been amended in some respects at all legislative sessions from 1935 to date, and has been incorporated, as amended, in the Revised Statutes of 1944 and 1954. At a special session of the Legislature in 1961 the law was amended by granting power to the courts to issue injunctions to enforce the Milk Commission Law. (P.L. 1961, Chap. 410) The legislative declaration was contained in the preamble to the legislation, as follows:

"Whereas, the production and distribution of milk is an industry within the State affected with a public interest; and

Whereas, the health of the public requires a continuous abundant supply of wholesome pure milk; and

Whereas, certain unfair practices have been carried on and may be carried on which are detrimental to the production, sale and distribution of wholesome milk, thereby leading to a lowering of the health standards and impairing an adequate supply of wholesome milk to the public; and

> Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine, and require the following legislation as immediately necessary for the preservation of the public peace, health and safety;"

The Maine Milk Commission Law provides that the Commission is vested with the power to establish and change, after investigation and public hearing, minimum prices to be paid to producers, and that the commission shall fix and establish, after investigation and public hearing, the wholesale and retail prices to be charged for milk distributed for sale within the state.

> "Prices so fixed shall be just and reasonable taking into due consideration the public health and welfare and the insuring of an adequate supply of pure and wholesome milk to the inhabitants of this State under varying conditions in various marketing areas, seasonal production and other conditions affecting the costs of production, transportation and marketing in the milk industry, including a reasonable return to the producer and dealer." R.S., c. 33, Sec. 4.

The record discloses that Cumberland sold milk at the minimum price established by the Commission with a coupon delivered to the purchaser, redeemable for a certain sum in cash in the event that the legislation was determined to be unconstitutional.

The dominant issue in this case is the constitutionality of the Maine Milk Commission Law.

The leading case in which the right to fix minimum prices for milk was challenged on constitutional grounds is *Nebbia* v. *People of New York* (1934) 291 U.S. 502. In that case the majority opinion held that the New York Milk Control Act, which authorized the establishment of minimum prices for milk, was not violative of the Fifth and Fourteenth Amendments to the Constitution of the

United States. The opinion conceded that the regulation of private business can be invoked only under special circumstances. In an elaborate opinion, the court said:

> "Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest.
>
> • • • •
>
> These correlative rights, that of the citizen to exercise exclusive dominion over property and freely to contract about his affairs, and that of the state to regulate the use of property and the conduct of business, are always in collision. No exercise of the private right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property. But subject only to constitutional restraint the private right must yield to the public need. • • •
>
> The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling, may be conditioned. Regulation of a business to prevent waste of the State's resources may be justified. And statutes prescribing the terms upon which those conducting certain businesses may

contract, or imposing terms if they do enter into agreements, are within the state's competency.

Legislation concerning sales of goods, and incidentally affecting prices, has repeatedly been held valid. In this class fall laws forbidding unfair competition by the charging of lower prices in one locality than those exacted in another, by giving trade inducements to purchasers, and by other forms of price discrimination. The public policy with respect to free competition has engendered state and federal statutes prohibiting monopolies, which have been upheld. On the other hand, where the policy of the state dictated that a monopoly should be granted, statutes having that effect have been held inoffensive to the constitutional guarantees. Moreover, the state or a municipality may itself enter into business in competition with private proprietors, and thus effectively although indirectly control the prices charged by them.* * * *

But we are told that because the law essays to control prices it denies due process. Notwithstanding the admitted power to correct existing economic ills by appropriate regulation of business, even though an indirect result may be a restriction of the freedom of contract or a modification of charges for services or the price of commodities, the appellant urges that direct fixation of prices is a type of regulation absolutely forbidden. His position is that the Fourteenth Amendment requires us to hold the challenged statute void for this reason alone. The argument runs that the public control of rates or prices is per se unreasonable and unconstitutional, save as applied to businesses affected with a public interest; that a business so affected is one in which property is devoted to an enterprise of a sort which the public itself might appropriately undertake, or one whose owner relies

on a public grant or franchise for the right to conduct the business, or in which he is bound to serve all who apply; in short, such as is commonly called a public utility; or a business in its nature a monopoly. The milk industry, it is said, possesses none of these characteristics, and, therefore, not being affected with a public interest, its charges may not be controlled by the state. Upon the soundness of this contention the appellant's case against the statute depends.

We may as well say at once that the dairy industry is not, in the accepted sense of the phrase, a public utility. We think the appellant is also right in asserting that there is in this case no suggestion of any monopoly or monopolistic practice. It goes without saying that those engaged in the business are in no way dependent upon public grants or franchises for the privilege of conducting their activities. But if, as must be conceded, the industry is subject to regulation in the public interest, what constitutional principle bars the state from correcting existing maladjustments by legislation touching prices? We think there is no such principle. The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negatived many years ago. *Munn* v. *Illinois*, 94 U.S. 113, 24 L.ed. 77.

* * * *

So far as the requirement of due process is concerned, and in the absence of other constitutional re-

striction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*. 'Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine.' *Northern Securities Co.* v. *United States*, 193 U.S. 197, 337, 338, 48 L. ed. 679, 700, 701, 24 S. Ct. 436, and it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.''

The issues in this case have not been passed upon in our jurisdiction. In *State* v. *Latham*, 115 Me. 176, the court held that a statute designed to compel purchasers

of milk intended for a particular use to pay their purchase debts at particular times or according to contract on pain of criminal prosecution was class legislation not based upon any real difference in situation or condition. In *State* v. *Old Tavern Farm, Inc.*, 133 Me. 468, a 1933 Act required that the proprietor of a milk gathering station give a bond as a condition precedent to obtaining a license. The court found *Latham* to be of controlling analogy and held the legislation violated the State and Federal Constitutions. (Fourteenth Amendment) The following excerpts are noted on pages 474 and 475:

> "*Munn* v. *Illinois*, 94 U.S., 113, 24 Law ed., 77, and *German Alliance Insurance Company* v. *Lewis*, 233 U.S., 389, 58 Law ed., 1011, sustain the right of a State to control private business when clothed with a public use. These two cases, however, go only to fixing prices.
>
> 'All businesses are subject to some measure of public regulation, . . . that the business of . . . the dairyman may be subjected to appropriate regulation in the interest of public health, cannot be doubted.' *New State Ice Company* v. *Liebmann*, 285 U.S., 262, 76 Law ed., 747.
>
> *Nebbia* v. *People*, 291 U.S., 502, 78 Law ed., 940, holds that, as to prices of milk produced within the State the industry may be regulated, within reason, if the public interest demands.
>
> Not price fixing, but the requirement of bond to pay the price, is now the test."

In *Opinion of the Justices*, 157 Me. 152, the Justices of the Supreme Court were asked to pass upon the constitutionality of legislation requiring semi-monthly payments to producers of milk under penalty of suspension or revocation of the license of a dealer upon violation. The Justices

noted that they were cognizant of certain facts, summarized as follows:

(1) That *Old Tavern Farm* arose under a statute enacted in 1933, and was decided in 1935, a few months after the original enactment of P.L. 1935, Chap. 13. (2) That the decision in that case represented the minority view of the decided cases in this country. (3) That the requirements of a bond to secure payments by dealers to producers (using the terms in a general sense, and not with the definition of the Milk Control Act specifically in mind) has been apparently upheld in connection with Milk Control Acts (*Nebbia* v. *New York*, supra). (4) That New Hampshire, Vermont and Massachusetts have provided by statute for bonds to secure payments to producers of milk.

Having these facts in mind and that the question submitted was really whether the Supreme Judicial Court sitting as the Law Court would overrule its decision in the *Latham* and *Old Tavern Farm, Inc.* cases, it was deemed that the question should not be answered, but should be left to litigation.

We are not called upon here to determine whether purchasers of milk for resale may constitutionally be required to pay their purchase debt, or whether the proprietor of a milk gathering station may be required to give a bond in order to secure a license. We are therefore not required to consider whether *Old Tavern Farm, Inc.* or *Latham* should be overruled. The issue here is the validity of price fixing which was never an issue in those cases.

The rationale of majority opinion in *Nebbia* has been followed almost universally in the state courts of this country. A partial list of those decisions in which *Nebbia* has been cited with approval are as follows: *Montana Milk Control Board* v. *Rehberg* (Mont.), 376 P. 2d. 508, 1962;

*Borden Company* v. *Thomason* (Mo.) 353 S.W. 2d. 735 (1962), (Unfair Milk Sales Practice Act); *Mississippi Milk Commission* v. *Vance* (Miss.), 129 S. 2d. 642 (1961) (contains an exhaustive research of federal and state decisions involving the constitutionality of Milk Control Acts); *Schwegmann Brothers Giant Super Markets* v. *McCrory* (La.), 112 S. 2d. 606 (1959); *Abbotts Dairies Inc.* v. *Armstrong* (N.J.) 102 A. 2d 372 (1953); *Board of Supervisors of Elizabeth City County et al* v. *State Milk Commission* (Va.) 60 S.E. 2d. 35 (1950); *State* v. *Auclair* (Vt.) 4A. 2d 107 (1939); *Ray, et al.* v. *Parker* (Cal.) 101 P. 2d. 664 (1940); *Savage* v. *Martin* (Or.) 91 P. 2d. 273 (1939); *Rohrer* v. *Milk Control Board* (Pa.) 186 A. 336 (1936); *State ex rel. Finnegan, et al.* v. *Lincoln Dairy Co.* (Wis.) 265 N.W. 197 (1936). See also cases cited or discussed in the following annotations: 101 A.L.R. 72; 110 A.L.R. 654; 155 A.L.R. 1403.

On the other hand *Harris* v. *Duncan* (Ga.) 67 S.E. 2d. 692 (1951) held that the milk industry is not such business affected with a public interest as to abridge the right of contract. The rationale of the opinion was the same as that expressed in the dissenting opinion in *Nebbia*.

In *Gwynette* v. *Meyers* (S.C.) 115 S.E. 2d 673 (1960) the court, by a three to two division rejected the idea that the public health, safety, or morals were involved in the Milk Control Act of South Carolina or that the milk industry was affected with a public interest. *Gwynette* was upheld in the recent case of *Stone* v. *Salley* (S.C.) 137 S.E. 2d. 788. (August 6, 1964)

In *Feretti, et al.* v. *Jackson, et al.* (N.H.) 188 A. 479 (1936) the court struck down the milk control law on the ground that it granted such a sweeping and general delegation of power that it exceeded constitutional limits. New legislation was then passed in which the board was empowered to establish prices after a finding of an economic

condition injurious to public health. In an advisory opinion the court held this provision constitutional, stating that the prices fixed by the board were not permanent but could be changed when public interest so demanded. In re *Opinion of the Justices*, (N.H.) 190 A. 713. In *Cumberland Farms Northern, Inc.* v. *Pierce* (N.H.) 190 A. 2d. 402 (1963) after such a finding, the court denied plaintiff's claim that no suitable standards were provided to guide and control the board in its determination of maximum and minimum prices.

Cumberland concedes that the state, under its police power, upon proper occasion and by appropriate measures, may regulate a business in any of its aspects including the prices to be charged for the product or the commodity it sells. It maintains, however, that the Maine Milk Commission Law, as amended, is permanent legislation (until repealed or otherwise amended by subsequent new legislation) which requires mandatorily that a government agency fix the minimum retail prices of milk at all times and incessantly. It argues that there is thereby established by law in this state, a system by which, permanently and unceasingly, the retail prices of milk must be fixed by an agency of government and that there can never be any period of time, regardless of the state of the market conditions in the industry, when a private businessman is at liberty to sell his own milk at such price as he may see fit and that the factual situation in this case does not justify such legislation.

In *Nebbia* the New York legislation under which the proceedings were initiated expired within a designated period. It is our understanding that *Nebbia*, as well as the other cases cited in the opinion, was not based upon the fact that the legislation expired by its own limitation.

In *Board of Supervisors of Elizabeth City County, et al.* v. *State Milk Commission*, supra, the court said:

> "Mr. Justice Roberts, speaking for the court in *Nebbia* v. *People of the State of New York* . . . did not base his decision upon an emergency, but on the ground that the milk industry was an industry affected with a public interest, and therefore subject to legislative control and regulation for the public good."

In *Ray, et al* v. *Parker,* supra, the court held that the milk industry bears a close relation to the public welfare and is sufficiently clothed with a public interest to warrant its regulation under the exercise of the police power, not only in emergencies but at all times.

In *Jersey Maid Milk Products Co.* v. *Brock* (Cal.) 91 P. 2d 577, 587 (1939) the court said:

> "Amici curiae seek to distinguish the Nebbia case from the instant case, and particularly call our attention to the fact that the New York statute was of temporary duration while the California act is without any limitation as to duration, but they fail to show how this difference in the two statutes does in any way divest the legislature of the power to protect an industry from a perilous condition which is permanent in character."

All acts of the Legislature are presumed to be constitutional and the presumption is one of great strength. The burden is upon him who claims that the act is unconstitutional to show its unconstitutionality. *State* v. *Fantastic Fair and Karmil Merchandising Corp.,* 158 Me. 450, 476.

It is a matter of common knowledge that the milk industry is one of the important industries in this state; that it is a food absolutely essential to the health of practically every individual in this state; that it is the primary diet of babies, and their health would be jeopardized without it; that it is essential to the balanced diet of the adult members of society; that it is perishable, cannot be stored, and is peculiarly susceptible to bacteria; that a sufficient sur-

plus supply is necessary to meet emergencies and that if the supply were to be cut off for a few days dire results would follow; that it is essential that it be delivered to consumers in the quickest possible time; that the safeguarding of its purity and the insuring of an adequate supply to the consumer presents a problem greater than in any other food product.

> "The law-making bodies have in the past endeavored to promote free competition by laws aimed at trusts and monopolies. The consequent interference with private property and freedom of contract has not availed with the courts to set these enactments aside as denying due process. Where the public interest was deemed to require the fixing of minimum prices, that expedient has been sustained. If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public. And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other." *Nebbia* v. *New York,* supra, on pages 957, 958, 78 L. ed.

The object sought to be attained by the Milk Commission Law is to prevent the disruption of the sale and distribution of milk through unfair, destructive and uneconomic practices. There is a further declaration that the sale and

distribution of milk is an industry affected with a public interest requiring legislation for the preservation of public health and safety. The method of attaining that object was by the establishment of prices in the state. In the absence of evidence to the contrary this court will take the statements in the preamble of legislative acts to be true, and will not substitute its judgment for that of the Legislature. Even in the absence of legislative findings, the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators. *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152.

The testimony in this case indicates that if price-fixing at the retail level were lifted, it would result in an influx of milk from outside the state. However, the evidence falls short of showing the facts that would disprove the legislative declarations and authorize its nullification on constitutional grounds.

The provisions of the Milk Commission Law do not wrongfully delegate the legislative power to the Commission. The legislation established price-fixing and set up adequate standards and guides to be followed by the Commission in fixing prices.

Neither the act nor the order under it is arbitrary, capricious, or unreasonable. The means adopted by the Legislature relate directly and appropriately to the object sought to be obtained.

We therefore hold that the Maine Milk Commission Law does not violate the due process clause of the Constitution of the State of Maine or the due process clause of the Constitution of the United States.

Cumberland also contends that the Milk Commission Law

violates the interstate commerce clause of the Constitution of the United States on the ground that the purpose of the legislation is to protect Maine Milk producers from economic injury resulting from out-of-state free-market competition.

As previously stated, the purpose of the legislation is to prevent the disruption of the sale and distribution of milk through unfair, destructive and uneconomic practices. We cannot accept the contention of Cumberland that the testimony in the case proves otherwise. Neither does the testimony prove that conditions in the industry have changed since the legislative declarations.

The law does not attempt to control the price paid for milk purchased outside of Maine, or the sales price outside this state of milk produced here. It merely attempts to regulate sales of milk within the state.

In *Milk Control Board of Pennsylvania* v. *Eisenberg Farm Products,* 306 U.S. 346, the court held that a state statute, regulating the milk industry, which required dealers to pay producers at least the minimum prices prescribed by an administrative agency was not in violation of the interstate commerce clause of the Federal Constitution in respect to a dealer who maintained a receiving station in the state at which he purchased milk from a neighboring farm and shipped outside the state for sale. The court in that case on page 351 said:

> "One of the commonest forms of state action is the exercise of the police power directed to the control of local conditions and exerted in the interest of the welfare of the state's citizens. Every state police statute necessarily will affect interstate commerce in some degree, but such a statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce. This is so even though, should

Congress determine to exercise its paramount power, the state law might thereby be restricted in operation or rendered unenforceable. These principles have guided judicial decision for more than a century. Clearly they not only are inevitable corrollaries of the constitutional provision, but their unimpaired enforcement is of the highest importance to the continued existence of our dual form of government. The difficulty arises not in their statement or in a ready assent to their propriety, but in their application in connection with the myriad variations in the methods and incidents of commercial intercourse.

The purpose of the statute under review obviously is to reach a domestic situation in the interest of the welfare of the producers and consumers of milk in Pennsylvania. Its provisions with respect to license, bond, and regulation of prices to be paid to producers are appropriate means to the ends in view."

Cumberland cites the recent case of *Polar Ice Cream & Creamery Co.* v. *Andrews*, 84 S. Ct. 378 11 L. ed. 2d. 389 (1964). In that case a state regulatory scheme which required local milk distributors to accept out of state milk only if local producers are unable to fill the distributors needs, was held to be invalid as a burden on interstate commerce. The court in this case said:

"The cases relied upon by the Commission do not save the regulatory scheme challenged here. Nebbia v. New York, 291 U.S. 502, 78 L. ed. 940, 54 S Ct 505, 89 ALR 1469, established that minimum retail and wholesale prices for milk purchased and sold within the State do not offend the Due Process and Equal Protection Clauses. Nor is such price regulation an impermissible burden upon commerce. Highland Farms Dairy v. Agnew, 300 US 608, 81 L ed 835, 57 S Ct 549, even as applied to a distributor who purchases and

cools milk within the State and then transports it to another State for processing and sale, since the burden on commerce is indirect and only incidental to the regulation of an essentially local activity. Milk Control Board v. Eisenberg Farm Products, 306 US 346, 83 L ed 752, 59 S Ct 528. In none of these cases was there any attempt to reserve a local market for local producers or to protect local producers from out-of-state competition by means of purchase and allocation requirements imposed upon milk distributors."

In *Baldwin* v. *Sielig* also cited by Cumberland, 294 U.S. 511, the New York Law forbade the sale in New York of milk obtained by a distributor from other states unless the distributor paid a price which would be lawful under New York regulations. The court held the New York Law could not outlaw Vermont milk purchased at below New York prices.

Cumberland also cited *Hood & Sons* v. *DuMond*, 336 U.S. 525, and *Dean Milk Co.* v. *Madison*, 340 U.S. 349. In *DuMond*, New York was found to have no power under the commerce clause to forbid an out of state distributor from establishing processing plants and additional sources of milk within the state. In *Dean*, the City of Madison was prevented from reserving the Madison market to producers located within a specified distance of the city.

In each of these cases, factors, not present in the instant case, were decisive in striking down the control legislation as unconstitutional.

The legislation in the instant case was enacted for a legitimate purpose. The burden imposed on interstate commerce was incidental only. We hold that it was not violative of the commerce clause of the Federal Constitution.

The remaining issue in this case is whether it is permissible to give away coupons with the purchase of Cumberland's milk, such coupons being redeemable in cash in

the event that price-fixing of milk is declared to be unconstitutional. This same question was an issue in the case of *Maine Milk Commission* v. *Cumberland Farms Northern, Inc.*, Law Court Docket #570 (Marden, J. not sitting) certified contemporaneously with this case. The issue in that case was resolved against Cumberland and governs the decision in this case.

The entry will be

*Appeal denied.*

WILLIAMSON, C.J. not sitting

---

*Counsel for the Plaintiff:*
JOHN W. BENOIT, ESQ.
*Assistant Attorney General*
State House
Augusta, Maine

*Counsel for the Defendant:*
BERMAN, BERMAN, WERNICK & FLAHERTY
By: SIDNEY W. WERNICK, ESQ.
85 Exchange Street
Portland, Maine

---

STATE OF MAINE

In the SUPREME JUDICIAL COURT for the State.

MAINE MILK COMMISSION

*v.*

CUMBERLAND FARMS NORTHERN, INC.

(Kennebec County Superior Court Civil Docket #8622)

---

In the above entitled case brought before this Court as a Court of Law from the Superior Court in the County of Kennebec and now pending on the Law Docket, the said case having been heard and maturely considered,

IT IS NOW ORDERED, That the Clerk of the Law Court now having the custody of the Law Docket enter upon said docket under said case, and certify to the Clerk of the

Superior Court in the County of Kennebec the following order, direction, judgment and decree of the Court in said case, to wit:

Appeal Dismissed
By the Court,
CECIL J. SIDDALL
*Justice.*

Dated December 3 A.D. 1964

---

MANDATE
[of Supreme Judicial Court]
MAINE MILK COMMISSION
*v.*
CUMBERLAND FARMS NORTHERN, INC.

CERTIFIED

Kennebec ss.
December 4, A.D. 1964.

Received, entered and filed.
Attest:
..... CLERK.

STATE OF MAINE

KENNEBEC, ss. SUPERIOR COURT

Civil Action, Docket #8622

ALAN H. CLARK, ET AL,
as they constitute the
MAINE MILK COMMISSION,
PLAINTIFF

*v.*

CUMBERLAND FARMS NORTHERN, INC.,
a corporation organized and existing under the laws
of the State of New Hampshire and presently doing
business in said State of Maine,
DEFENDANT

JUDGMENT OF PERMANENT INJUNCTION

Hearing had on the merits this 11th day of February, 1964.

There being no further evidence to be presented to the Court, the Plaintiff rested finally and the Defendant rested finally.

Upon all of the evidence and the findings heretofore made,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

That the Defendant, its officers, agents, servants, employees and attorneys, and all persons in active concert or participation with it, be and are hereby permanently enjoined from the issuance and delivery of coupons here subject to complaint in connection with sales of milk in the State of Maine.

(s) HAROLD C. MARDEN
HAROLD C. MARDEN, *Justice*
Supreme Judicial Court

February 11, 1964.

# DOCKET ENTRIES

[in Supreme Judicial Court]

No. 577 Sup. Ct.

MAINE MILK COMMISSION

*v.*

CUMBERLAND FARMS NORTHERN, INC.

*Ass't. Attorney General*
JOHN W. BENOIT,

BERMAN, BERMAN, WERNICK and FLAHERTY
By: SIDNEY W. WERNICK

On Appeal by Deft.
One printed record for #567 and #577

| | |
|---|---|
| CASE IN | April 10, 1964 |
| PLT'F BRIEF IN | Sept. 22, 1964 |
| DFT BRIEF IN | Sept. 22, 1964 |
| Oct. 6, 1964 | Argued. Williamson, C.J. did not sit. |
| Oct. 6, 1964 | State suppl. Brief filed. |
| Dec. 4, 1964 | Mandate received: "Appeal dismissed". |
| Dec. 18, 1964 | Notice of appeal to Supreme Ct. of U. S. filed. |

## Appendix B

### Pertinent Provisions of MAINE MILK COMMISSION LAW

Revised Statutes, 1954, Chapter 33, as amended by Public Laws of 1955, Chapter 341 and Chapter 471, Section 6; Public Laws of 1957, Chapters 312, 384 and 407; Public Laws of 1959, Chapter 236 and by the Public Laws of 1961, Chapters 219, 410, Chapter 394, Section 19 and Chapter 417, Section 102.

Sec. 1. *Definitions.*—As used in this chapter, unless the context otherwise requires, the following words shall have the following meaning:

"Books and records" means books, records, accounts, memoranda or other data pertaining to the purchase and distribution of milk.

"Commission" means the Maine Milk Commission.

"Consumer" means any person other than a milk dealer who purchases milk for fluid consumption.

"Dealer" means any person who purchases or receives milk for sale as the consignee or agent of a producer, or handles for sale, shipment, storage or processing within the State and shall include a producer-dealer and a sub-dealer, but shall not include a store.

"Market" means any city, town or parts thereof, of the State, or 2 or more of the same, or parts thereof, designated by the Commission as a natural marketing area.

"Milk" means whole milk and cream, fresh, sour or storage; skimmed milk and buttermilk; irrespective of whether or not any such milk is flavored.

"Person" means any individual, partnership, firm, corporation, association or other unit, and the State and all political subdivisions or agencies thereof, except State owned and operated institutions.

"Producer" means any person who produces milk and sells his said milk only to dealers as above defined.

"Producer-dealer" means a dealer who himself produces a part or all of his milk or a person who produces milk and sells to a grocery store or dairy products store or similar commercial establishment.

"Retail sale" means a doorstep delivery and over-the-counter sales by stores.

"Store" means a grocery store, dairy product store, canteen, milk vending machine operator, milk dispensing operator or any similar commercial establishment or outlet or any other sale where milk is sold to consumers for consumption off the premises where sold. (c. 410, P.L. 1961)

"Sub-dealer" means any person who does not process milk and who purchases milk from a dealer and sells such milk in the same containers in which he purchased it, but shall not include a store.

"Wholesale sale" means sale to any other person not included in retail.

SEC. 2. *Maine Milk Commission.*—The Maine Milk Commission, as heretofore established, shall consist of 2 producers, a dealer, a producer-dealer and 2 consumers, all of whom shall be residents of the State. They shall be appointed by the Governor with the advice and consent of the Council and shall serve for a term of 4 years and until their successors have been duly appointed and qualified. The Commissioner of Agriculture shall be ex officio a member of said Commission. The members of said Commission shall elect a Chairman and may employ a secretary and such clerks and assistants as may be deemed necessary and may prescribe their duties and fix their compensation, subject to the provisions of the Personnel Law. Legal services and the services of experts in other lines shall be performed as far as possible by the existing state departments, including the Department of Agriculture, the Department of Health and Welfare and the Attorney General's Department. Any vacancy in the membership of said Commission

shall be filled by appointment by the Governor, with the advice and consent of the Council. Members of the Commission shall be allowed actual traveling and other necessary expenses incurred in the performance of their duties and each member shall receive a per diem compensation for the time actually spent in the performance of his duties, such compensation to be determined by the Governor and Council; provided that the cost of administration of said Commission, including expenses and compensation of members, shall not exceed the amount of fees collected under the provisions of this chapter. The Commission shall be furnished a suitable office in the State Capitol together with all necessary equipment and supplies therefor.

SEC. 3. *Powers and duties.*—The Commission shall have power to supervise, regulate and control the purchasing, distribution and sale of milk within the State as hereinafter provided, in such a manner as to supplement such supervision and regulations as are now imposed by existing statutes or by lawful ordinances or rules and regulations of the several cities and towns of the State. The Commission shall, however, have no power to modify, add to or annul any sanitary regulations imposed by any state or municipal authority, or to compel pasteurization in any market area. The Commission in administering the provisions of this chapter shall adopt such policies as are consistent with the promotion of marketing programs which progressively eliminate those conditions in the milk industry necessitating the present law. The Commission shall cooperate with the Commissioner of Agriculture and with representatives of the industry in devising marketing programs to implement such policies. In administering the provisions of this chapter, it shall have power to conduct hearings, subpoena and examine under oath dealers with their records, books and accounts and any other person from whom information may be desired to carry out the

purposes and intent of this chapter and any Member of the Commission may sign subpoenas and administer oaths to witnesses. Any Member of the Commission or its representatives may enter at all reasonable hours all places where milk is being received, processed, stored or otherwise handled and shall have access to all books and records relating to milk for the purpose of ascertaining facts to enable the Commission to administer the provisions of this chapter. The Commission may adopt, promulgate and enforce all rules and orders necessary to carry out said provisions.

The Commission may act as mediator or arbitrator to settle any controversy or issue or between producers, dealers and consumers, any of whom may petition the Commission in writing to change prices or conditions in any market area.

SEC. 4. *Price fixing.*—The Commission shall hold meetings on the 3rd Thursday of each calendar month, and shall appoint a time at each meeting when any producer, dealer or consumer may present complaints or suggestions for the betterment of the conditions of trade and shall endeavor to effect amicable reconciliations of differences which exist between the various milk interests, and such other meetings as are necessary to properly supervise and control the industry. The chairman shall call a meeting of the Commission whenever requested in writing by any 2 members of the Commission. The Commission is vested with power to establish and change after investigation and public hearing, minimum prices to be paid to producers by dealers for milk received, purchased, stored, manufactured, processed, sold, distributed or otherwise handled within the State. The Commission shall fix and establish after investigation and public hearing, of which due notice has been given by publishing at least 3 days prior to said hearing in appropriate newspapers, the wholesale and retail

prices to be charged for milk distributed for sale within the State, wherever produced, including the following sales:

I. By dealers to dealers.

II. By dealers to consumers.

III. By stores to consumers, except for consumption on the premises where sold.

IV. By dealer to stores either for consumption on the premises or resale to consumers.

V. By any person not included in the foregoing classifications to another person.

VI. By producers to dealers.

Sales by producers of raw milk produced and sold to consumers on the premises of the producer are excluded from the provisions of this chapter in respect to such sales.

The Commission in its discretion may waive public hearing when the sole change to be made in minimum prices is to conform with orders of any federal agency, duly authorized by law to determine prices.

The Commission is vested with power to establish and change, after investigation and public hearing, classifications of milk according to its various usages, and shall specify to what classification the prices fixed and established under the provisions of this chapter shall apply.

The dealer-to-dealer prices for all sales shall be established only in such market areas as are necessary for the stabilizing of market conditions. All sales between dealers shall be considered milk of such classifications as the Commission by appropriate rules may provide.

No price shall be established for any 1 or more of said sales unless at the same time a price shall be established for all of said sales in any market.

Prices so fixed shall be just and reasonable, taking into due consideration the public health and welfare and the insuring of an adequate supply of pure and wholesome milk to the inhabitants of this State under varying conditions

in various marketing areas, seasonal production and other conditions affecting the costs of production, transportation and marketing in the milk industry, including a reasonable return to the producer and dealer.

Upon fixing said minimum prices in any market which shall apply to the various classifications of milk and which may vary in the several market areas of the State, the Commission shall furnish all dealers registered in said market with a schedule of such prices, and shall publish a schedule thereof in appropriate newspapers in said market. Such order shall become effective in accordance with Chapter 20-A and thereafter no dealer, store or other person handling milk in such market shall buy or offer to buy, sell or offer to sell milk for less than the scheduled minimum prices established for that market. (c. 417, P.L. 1961).

Any dealer who purchases or receives milk for sale as consignee or agent of a producer may deduct an allowance for transportation not in excess of the amount specified in a written agreement between the dealer and producer, a copy of which, signed by both parties, shall have been filed with the Commission prior to the beginning of the delivery period.

It shall be unlawful for any person to engage in any practice destructive of the scheduled minimum prices for milk established under the provisions of this Chapter for any market, including but not limited to any discount, rebate, gratuity, advertising allowance or combination price for milk with any other commodity. In addition to any penalty otherwise provided by law, the Commission after notice and hearing may prohibit any such practice, and any person feeling himself aggrieved by any order of the Commission issued under the provisions of this chapter may appeal to the Superior Court as provided in section 5.

The minimum prices established for sales of milk by producers to dealers may, if such sales are made by bulk

tank, be increased by such amounts per hundredweight as may be determined by the Maine Milk Commission. Violation of this paragraph shall be sufficient cause for the Maine Milk Commission to revoke or withhold a dealer's license. (c. 219, P.L. 1961).

Whenever milk produced outside the State becomes a subject of regulation by the State in the exercise of its police powers, the provisions of this chapter shall apply and the powers of the commission shall attach. After any such milk so produced shall come within the jurisdiction of this State, any sale of such milk within this State at a price less than the scheduled minimum price established in any given market shall be unlawful. (c. 410, P.L. 1961)

* * *

SEC. 9. *Penalty.*—Whoever violates any of the provisions of this chapter or of any rule or order of the Commission shall be punished by a fine of not more than $100, or by imprisonment for not more than 11 months, or by both such fine and imprisonment.

SEC. 9-A.—*Injunction.*—In addition to any other remedy set forth in this chapter for the enforcement of this chapter or any rule, regulation, order or decision of the commission, the Superior Court shall have jurisdiction upon complaint filed by the commission, or any person duly authorized to act for the commission, including but not limited to its executive secretary, to restrain or enjoin any person from committing any act prohibited by this chapter or prohibited by any rule, regulation, order or decision of the commission. If it is established upon hearing that the person charged has been or is committing any act declared to be unlawful by this chapter or is in violation of any rule, regulation, order or decision of the commission, the court shall enter a decree perpetually enjoining said person from further commission of such act or actions. In case of violation

of any injunction issued under this section, the court shall summarily try and punish the person for contempt of court. The existence of other civil or criminal remedies shall be no defense to this proceeding. The commission or its authorized agent shall not be required to give or post a bond when making an application for an injunction under this section. (c. 410, P.L. 1961)

SEC. 10. *Constitutionality.*—If any section or other part of this chapter is, for any reason, held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this chapter.